

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
OFFICER		
COUNTY OF RICHLAND)	
)	
In the Matter of:)	
)	
Cancellation of Awards Prior to)	WRITTEN DETERMINATION
Performance)	
)	
Department of Transportation)	
IFB No. SB10259)	POSTING DATE: April 1, 2011
Crane Rental for)	
<u>Districts 1, 2, 3, 4, and 5</u>)	MAILING DATE: April 1, 2011

This matter is before the Chief Procurement Officer (CPO) based on a request by South Carolina Department of Transportation (SCDOT) to cancel the awards that it issued for the above-referenced invitation for bids (IFB) pursuant to South Carolina Budget and Control Board (Board) Regulation 19-445.2085(C).

In the attached email dated February 7, 2011, David Rawl of SCDOT wrote:

In accordance with Regulation 19-445-2085(C) Cancellation of Award Prior to Performance we are requesting permission to cancel the Intent to Award for our crane rental solicitation SB10259. In an attempt to answer questions from an Offeror we discovered our bid schedule was unclear and subject to interpretation. Depending how we calculated the hourly rates and travel times it became apparent we could not determine the low offer on each lot. I believe this is also reflected in the letter of protest from Maxim Crane and Campbell Crane.¹ Our intention is to revise our bid schedule, clarify the scope of work and rebid. Taking all into consideration we believe cancelling this award is clearly in the best interest of the Department. We request your concurrence.

¹ The CPO will rule upon these protests that SCDOT references in a separate Decision. However, relevant excerpts of the protest letter are listed here for clarification of SCDOT's reasons for its request. Campbell Crane's protest stated, in part, "I don't think there has been any stipulation on Travel Time to & from the Job. This is important because the Crane Companies in this type Industry, unless agreed to otherwise, start charging the hourly rate when they leave their yard, through the hook time on the job & stop the hourly rate when they have arrived back on their yard." Maxim Crane Works' protest argued, "I submitted pricing that is well below the pricing of the awarded."

At the request of the CPO, Mr. Rawl submitted additional explanation on February 23, 2011, stating in part:

(A)s a result of that protest we suspended the award to allow a thorough review of the bid and award. During the management review we determined that there was ambiguity in the bid schedule and the method to be used in determining the low bidder. Where a black and white method to determine low bid is required there was room for interpretation and consideration of several methods of calculation. To complicate the matter estimated quantities were provided for information but were not clearly identified as such. Providers therefore used their own determination for entering their costs. There is no clear way to reconcile this issue without cleaning the solicitation, the specification and the award criteria.

We are in the process of updating the specifications and the award criteria to eliminate the ambiguity. In doing so we are restructuring the requirements in such a way as to mitigate any impact of the prices that have been exposed. (Copy attached)

On March 21, 2011, SCDOT also provided a supplemental request, which reads in relevant part:

I have attached a draft copy of the revised solicitation for crane rental and a copy of the bid tab from the original bid. As discussed we concluded a "fair" award was not possible on solicitation SB12059. We were unclear on the bid schedule in how we were going to award. Also, in rethinking the original solicitation did not consider all factors of cost for example drive time and proximity of the job. We have attempted to cure this in the new solicitation by factoring in a mobilization charge and not considering overtime work hours. (Copy attached)

Under the authority granted by Section 11-35-1520(7) of the South Carolina Consolidated Procurement Code (Code) and by Regulation 19-445.2085(C), this written determination follows.

Background

On November 3, 2010, SCDOT issued an IFB seeking bids for crane rentals manned with operators for the five SCDOT districts across the state. [Ex. 1] SCDOT opened the bids received December 23, 2010. After evaluating the bids received, SCDOT posted an intent to award to a primary and secondary vendor in each district for each of the lots, which were comprised of various crane sizes. Pursuant to the Intent to Award, which was posted on January 24, 2011, awards were made to White Crane Co., Southway Crane, and Southern Crane. [Ex. 2] On February 1, 2011, Campbell Crane filed a protest letter. [Ex. 3] SCDOT issued a notice suspended the awards in all five districts on February 3, 2011. [Ex. 4] On February 4, 2011, Maxim Crane Works also filed a protest. [Ex. 5]

Conclusions of Law

After a notice of intent to award is issued but before performance has commenced, the Code permits the cancellation and re-award of awards or contracts in accordance with the regulations of the Board. Section 11-35-1520(7). Regulation 19-445.2085(C) provides:

After an award or notification of intent to award, whichever is earlier, has been issued but before performance has begun, **the award or contract may be canceled and either re-awarded or a new solicitation issued or the existing solicitation canceled**, if the Chief Procurement Officer determines in writing that:...

- (1) Inadequate or ambiguous specifications were cited in the invitation;
- (2) Specifications have been revised;
- (3) The supplies, services, information technology, or construction being procured are no longer required;

- (4) The invitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
- (5) Bids received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the bids were invited;
- (6) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;
- (7) Administrative error of the purchasing agency discovered prior to performance, or
- (8) For other reasons, cancellation is clearly in the best interest of the State. (Emphasis added)

The South Carolina Procurement Review Panel (Panel) has expressly recognized the CPO's right to exercise his authority under Regulation 19-445.2085(C). See Protest of Specialty Underwriters and Appeal of Keenan & Suggs, Case No. 2004-2 (upholding the CPO's decision to cancel and resolicit due to inadequate and ambiguous specifications where the RFP contained confusing language); Protest of B&D Marine and Industrial Boilers, Inc., Appeal by C&C Boiler Sales & Services, Inc., Case No. 2000-12 (finding that cancellation and resolicitation was appropriate where the specifications were unduly restrictive and did not assure a cost effective procurement of the state's needs); Protest of Analytical Automation Specialists, Inc., Case No. 1999-1 (authorizing a CPO to cancel and resolicit the procurement where the specifications have been revised); and Protest of Blue Cross Blue Shield of South Carolina and Public Consulting Group, Inc., Case No. 1996-3 (holding that the CPO's cancellation of the award and order of resolicitation was justified because the solicitation contained inadequate and ambiguous specifications and an administrative error on the duration of the contract). In all of the above cases, the Panel found that cancellation and resolicitation was appropriate.

Here I first find that SCDOT's solicitation fails to explain how SCDOT will evaluate or calculate the awards. Section VI of the IFB specifies that the award(s) will be made by lot to the lowest responsible and responsive bidder(s). [Ex. 1, p. 15] Section VIII reflects that the bidding schedule has at least two line items requesting two prices - a cost per hour rental and an hourly overtime rate - for some districts and lots. On some of the lots, the bidding schedule contains an additional line item that requests a third price for truck load of counter weights. [Ex. 1, pp. 25-56] However, the CPO agrees that it is unclear how SCDOT will calculate the two lowest bidders for each lot; further, the low bids could be calculated in more than one way. Due to these facts, cancellation and resolicitation is warranted due to several factors. Clearly the IFB contains inadequate or ambiguous specifications or requirements on how the awards would be calculated in violation of Regulation 19-445.2085(C)(1). Based on the draft revised IFB submitted to the CPO for review, the specifications have been revised in compliance with Regulation 19-445.2085(C)(2). [Ex. 6] Further, this ambiguity results in an administrative error of the purchasing agency pursuant to Regulation 190445.2085(C)(7) because the IFB is in violation of law for failing to state how bids would be evaluated.²

Second, I find that the IFB fails to take into account varying travel times among vendors, and cancellation and resolicitation is also warranted on these facts based on Regulation 19.445.2085(C)(4). Regulation 19.445-2085(C)(4) is applicable where "the invitation did not provide for consideration of all factors of cost to the state, such as cost of transporting state furnished property to bidder's plants." Here the IFB did not provide for consideration of all factors of cost to the State because it provides no way for SCDOT to consider additional time it will be charged for the transporting of cranes by vendors housed further away from the jobsite.

² According to Section 11-35-1520(6) of the Code, "[b]ids must be evaluated based on the requirements in the invitation for bids" and "[c]riteria must not be used in bid evaluation that are not in the invitation for bids."

Since lengthy travel time under the current IFB will cost the state more money, cancellation is also clearly in the best interest of the state pursuant to Regulation 19-445.2085(C)(8). Moreover, the revised specifications appear to address this issue. [Ex. 6]

Finally, I also find that the IFB was unclear as to the duration of the contract. Although SCDOT intended this to be a one year initial contract with one, one-year option to renew for a total possible contract period of two years, that is not what the IFB reflects. Under Section I, it states that this solicitation is “for a contract for various crane sizes for one year.” [Ex. 1, p. 4] It also specifies in the “Maximum Contract Period – Estimated” provision that it is for one year, rather than a potential for two years. [Ex. 1, p. 5] However, Section VII contemplates an initial contract period of one year as well at least some one year options to renew, although how many are unclear. [Ex. 1, p. 22] The term of the contract is essential, not only making it uncertain to the parties as to the duration of the contract but also potentially affecting the bid prices. Therefore, cancellation and resolicitation is warranted on this ground based on inadequate or ambiguous specifications due to an apparent administrative error and because cancellation is clearly in the best interests of the state. Regulation 19-445.2085(C)(1), (7) & (8). According to the Panel, an ambiguous solicitation leads to an ambiguous contract and “it is not in the State’s interest, or any other party’s interest, to enter a contract with ambiguous terms.” Protest of Blue Cross Blue Shield of South Carolina, Case No. 1996-3.

Accordingly, I find that a remedy pursuant to Regulation 19-445.2085 is necessary. Based on the circumstances detailed above, cancellation and resolicitation is the appropriate remedy in this matter. Therefore, SCDOT is directed to cancel the intent to award and resolicit in accordance with the Code and Regulations.



April 1, 2011

Columbia, SC.

STATEMENT OF RIGHT TO ADMINISTRATIVE REVIEW

Written Determination Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(b) requests for review of other written determinations, decisions, policies, and procedures arising from or concerning the procurement of supplies, services, information technology, or construction procured in accordance with the provisions of this code and the ensuing regulations; except that a matter which could have been brought before the chief procurement officers in a timely and appropriate manner pursuant to Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, must not be the subject of review under this paragraph. Requests for review pursuant to this paragraph must be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of the written determinations, decisions, policies, and procedures.

Copies of the Panel's decisions and additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Requests must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an action before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

Shealy, Voight

From: Rawl, David E. [RawlDE@dot.state.sc.us]
Sent: Monday, February 07, 2011 11:05 AM
To: Shealy, Voight
Cc: Burk, Mike A; Crooks, H. Lane; Skinner, Gail; Stevens, John
Subject: Bid SB10259 Award

Voight,

In accordance with Regulation 19-445-2085 (C) Cancellation of Award Prior to Performance we are requesting permission to cancel the Intent to Award for our crane rental solicitation SB10259. In an attempt to answer questions from an Offeror we discovered our bid schedule was unclear and subject to interpretation. Depending how we calculated the hourly rates and travel times it became apparent we could not determine the low offer on each lot. I believe this is also reflected in the letter of protest from Maxim Crane and Campbell Crane. Our intention is to revise our bid schedule, clarify the scope of work and rebid. Taking all into consideration we believe cancelling this award is clearly in the best interest of the Department. We request your concurrence.

Thanks in advance.

David Rawl

4/1/2011

Shealy, Voight

From: Rawl, David E. [RawlDE@dot.state.sc.us]
Sent: Wednesday, February 23, 2011 1:04 PM
To: Shealy, Voight
Cc: Burk, Mike A; Crooks, H. Lane
Subject: SB10259

Voight,

The following should help clear up the questions you have in regards to our award cancelation request. Most of this information came from a letter Mike wrote in response to questions Maxim Crane posed about how we determined the award. If you need anything additional please let me know.

David

Solicitation SB10259 was issued on 11/03/2010 and advertised in the November 3rd issue of South Carolina Business Opportunities (SCBO). A Pre-Bid conference was scheduled for and held on November 23, 2010. The pre-bid conference was held to allow questions about the solicitation, the requirements, and clarification of the solicitation where needed. The bid was opened on 12/23/10 as scheduled

The bid results were tabulated and evaluated against the requirements of the solicitation and an intent to award was issued January 24, 2011 to become effective February 4, 2011. The intent of the solicitation was to secure an hourly rate, an hourly overtime rate, and a truck load rate for any necessary counter weights for a variety of crane sizes and comprised of 20 different total lots for 5 different SCDOT engineering districts. The solicitation called for a primary provider and a secondary provider. The secondary provider would be used only if the primary provider was unable to provide the required equipment at the time needed.

The solicitation tabulation evaluation of one hour rental rate plus an overtime hourly rate plus a truck load counter weight yielded the results posted on the intent to award.

Subsequent to the posting of the intent to award a protest was received that in essence went to the specification and not to the method of award. We do not believe this protest would not have been timely in that a specification protest must be filed within ten days of the advertisement. However as a result of that protest we suspended the award to allow a thorough review of the bid and award. During the management review we determined that there was ambiguity in the bid schedule and the method to be used in determining the low bidder. Where a black and white method to determine low bid is required there was room for interpretation and consideration of several methods of calculation. To complicate the matter estimated quantities were provided for information but were not clearly identified as such. Providers therefore used their own determination for entering their costs. There is no clear way to reconcile this issue without cleaning the solicitation, the specification and the award criteria.

We are in the process of updating the specifications and the award criteria to eliminate the ambiguity. In doing so we are restructuring the requirements in such a way as to mitigate any impact of the prices that have been exposed.

Shealy, Voight

From: Rawl, David E. [RawlDE@dot.state.sc.us]
Sent: Monday, March 21, 2011 4:56 PM
To: Shealy, Voight
Subject: Crane rental draft solicitation
Attachments: SB10299 CRANE RENTAL ALL DISTRICTS FOR BRIDGE WORK AND REPAIR VARIOUS LOCATIONS.doc; Bid tab.pdf

Voight,

I have attached a draft copy of the revised solicitation for crane rental and a copy of the bid tab from the original bid. As discussed we concluded a "fair" award was not possible on solicitation SB12059. We were unclear on the bid schedule in how we were going to award. Also, in rethinking the original solicitation did not consider all factors of cost for example drive time and proximity of the job. We have attempted to cure this in the new solicitation by factoring in a mobilization charge and not considering overtime work hours. If you need additional information please let me know.

David

4/1/2011